165

(4)

No. 09-1023

In the Supreme Court of the United States

APEX OIL COMPANY, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

NEAL KUMAR KATYAL
Acting Solicitor General
Counsel of Record

IGNACIA S. MORENO
Assistant Attorney General

RANDALL M. STONE
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether an injunction issued pursuant to the Resource Conservation and Recovery Act of 1976, 42 U.S.C. 6973, ordering a polluter to clean up a hazardous waste site that poses an imminent and substantial endangerment to health and the environment, gives rise to a dischargeable "claim" under the Bankruptcy Code, 11 U.S.C. 101(5).

TABLE OF CONTENTS

		Page
Opinions below		1
Jurisdiction		1
Statement		2
Argument		6
Conclusion		21
Appendix	Order and terms of injunction (July 28, 2008)	1a

TABLE OF AUTHORITIES

Cases:

Ben Franklin Hotel Assocs., In re, 186 F.3d 301 (3d Cir. 1999) 11, 16

Commonwealth Oil Ref. Co., In re, 805 F.2d 1175 (5th Cir. 1986), cert. denied, 483 U.S. 1005 (1987) 11, 19

Courchesne v. *Town of Lincoln*, 790 F.2d 971 (1st Cir. 1986) 11, 19

Duncan v. *Walker*, 533 U.S. 167 (2001) 19

Gonzales v. *Tazbir*, 37 F.3d 295 (7th Cir. 1994) 16

Johnson v. *Home State Bank*, 501 U.S. 78 (1991) 17

Kelley v. *United States*, 618 F. Supp. 1103 (W.D. Mich. 1985) 13

Meghrig v. *KFC Western, Inc.*, 516 U.S. 479 (1996) .. 13, 14

Ohio v. *Kovacs*, 469 U.S. 274 (1985) ..... *passim*

Penn Terra Ltd. v. *Department of Envtl. Res.*, 733 F.2d 267 (3d Cir. 1984) 19

Safety Kleen, Inc. (Pinewood) v. *Wyche*, 274 F.3d 846 (4th Cir. 2001) 19

Cases—Continued: Page

SEC v. *American Bd. Of Trade, Inc.*, 830 F.2d 431 (2d Cir. 1987), cert. denied, 485 U.S. 938 (1988) 15

Sheerin v. *Davis (Davis, In re)*, 3 F.3d 113 (5th Cir. 1993) 16

Toroico Elecs., Inc., In re, 8 F.3d 146 (3d Cir. 1993), cert. denied, 511 U.S. 1046 (1994) 14, 17, 19

TRW, Inc. v. *Andrews*, 534 U.S. 19 (2001) 19

Udell, In re, 18 F.3d 403 (7th Cir. 1994) 11, 16

United States v. *LTV Corp. (Chateaugay Corp., In re)*, 944 F.2d 997 (2d Cir. 1991) 11, 14, 17

United States v. *Whizco, Inc.*, 841 F.2d 147 (6th Cir. 1988) 7, 11, 16, 17

United States v. *United Mine Workers of Am.*, 330 U.S. 258 (1947) 15

Utah Div. of Oil, Gas and Mining v. *Kaiser Steel Corp. (In re Kaiser Steel Corp.)*, 87 B.R. 662 (Bankr. D. Colo. 1988) 20

Statutes, regulations and rule:

Bankruptcy Code, 11 U.S.C. 101 *et seq.*:

11 U.S.C. 101(4)(1982) 3

11 U.S.C. 101(5) 3, 18

11 U.S.C. 101(5)(B) ..... *passim*

11 U.S.C. 101(12) 3, 7

11 U.S.C. 362(c)(4) 19

11 U.S.C. 524(a)(2) 7

Ch. 7, 11 U.S.C. 701 *et seq.*:

11 U.S.C. 727 3

Statutes, regulations and rule—Continued: Page

Ch. 11, U.S.C. 1101 *et seq.*:
11 U.S.C. 1141(d)(1)(A) 7
Clean Water Act, 33 U.S.C. 1251 *et seq.*:
33 U.S.C. 1321 (§ 311) 13
33 U.S.C. 1321(c) 13
33 U.S.C. 1321(f) 13
Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. 9601 *et seq.*:
42 U.S.C. 9601(14) 13
Oil Pollution Act of 1990, Pub. L. No. 101-380, 104 Stat. 484 13
Resource Conservation and Recovery Act of 1976, 42 U.S.C. 6901 *et seq* 2
42 U.S.C. 6902(b) 2
42 U.S.C. 6972(a) 14
42 U.S.C. 6972(a)(1)(B) 5
42 U.S.C. 6973 ..... 2, 4
42 U.S.C. 6973(a) 2, 6, 8, 12, 14
42 U.S.C. 6902(b) 2
Fed. R. Civ. P. 70(a) 11

Miscellaneous:

H.R. 8200, 95th Cong., 1st Sess. (1977) 8

In the Supreme Court of the United States

No. 09-1023

APEX OIL COMPANY, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is reported at 579 F.3d 734. An opinion of the district court (Pet. App. 197a-211a) is reported at 438 F. Supp. 2d 948. Other pertinent decisions of the district court (Pet. App. 13a-191a, 192a-196a; App., *infra*, 1a-3a) are unreported.[1]

JURISDICTION

The judgment of the court of appeals was entered on August 25, 2009. A petition for rehearing was denied on October 29, 2009 (Pet. App. 212a-213a). On January 19, 2010, Justice Stevens extended the time within which to

[1] The district court's injunction is reproduced in an appendix to this brief (App., *infra*, 1a-3a).

file a petition for a writ of certiorari to and including February 26, 2010, and the petition was filed on February 23, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. The Resource Conservation and Recovery Act of 1976 (RCRA), 42 U.S.C. 6901 *et seq.*, reflects a national policy of "minimiz[ing] the present and future threat to human health and the environment" posed by solid and hazardous wastes. 42 U.S.C. 6902(b). RCRA authorizes the Administrator of the United States Environmental Protection Agency (EPA) to take action to abate an imminent and substantial threat to health or the environment as a result of solid or hazardous waste. 42 U.S.C. 6973. Specifically, the statute provides:

> [U]pon receipt of evidence that the past or present handling, storage, treatment, transportation or disposal of any solid waste or hazardous waste may present an imminent and substantial endangerment to health or the environment, the Administrator may bring suit on behalf of the United States in the appropriate district court against any person (including any past or present generator, past or present transporter, or past or present owner or operator of a treatment, storage, or disposal facility) who has contributed or who is contributing to such handling, storage, treatment, transportation or disposal to restrain such person from such handling, storage, treatment, transportation, or disposal, to order such person to take such other action as may be necessary, or both.

42 U.S.C. 6973(a).

b. Chapter 11 of the United States Bankruptcy Code permits a debtor to discharge certain "debt[s]" as part of a reorganization. See 11 U.S.C. 727. The Code defines the term "debt" as "liability on a claim." 11 U.S.C. 101(12). The term "claim" is defined to mean:

> (A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or
>
> (B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured;

11 U.S.C. 101(5).[2]

2. a. This case involves the application of RCRA to underground pollution linked to an oil refinery in the town of Hartford, Illinois. Petitioner's corporate predecessor owned and operated the Hartford refinery from 1967 to 1988. Pet. App. 14a-16a. Beneath Hartford, millions of gallons of oil have created a large underground plume of hydrocarbons that was formed in part by repeated leaks and spills from the Hartford refinery and petroleum product lines running from the Hartford refinery. *Id.* at 1a, 27a-60a. Over several decades, the plume has contaminated groundwater in the area and has emitted fumes that rise to the surface and enter

---

[2] When petitioner filed for bankruptcy in 1987, the definition of "claim" was codified at 11 U.S.C. 101(4) (1982). It is now codified at 11 U.S.C. 101(5) (2007), but the definition has not changed. Because petitioner cites to the current codification, we do the same.

houses in Hartford, causing odor complaints, health complaints, and some fires. *Id.* at 1a, 73a-98a. Forensic analyses of the hydrocarbon plume beneath Hartford demonstrated that a great majority of tested samples exhibited chemical characteristics that were consistent with the gasoline produced by the Hartford refinery and inconsistent with gasoline produced by several other refineries in the area. *Id.* at 61a-73a.

b. In 1987, prior to the commencement of the instant suit, petitioner's corporate predecessor filed a voluntary petition for relief under Chapter 11 of the United States Bankruptcy Code. Pet. App. 198a. In 1990, a bankruptcy court entered a confirmation order discharging the consolidated debtors and their estates from any and all claims, debts, and liens arising before the date of confirmation. *Ibid.*

3. In 2005, the Administrator of the EPA filed this action in the name of the United States pursuant to 42 U.S.C. 6973. Pet. App. 1a. The suit sought injunctive relief ordering petitioner to clean up the contamination in Hartford. *Ibid.* After holding a bench trial, the district court concluded that the contamination presents or may present an imminent and substantial endangerment to health and the environment. *Ibid.*; *id.* at 176a-182a. The court also concluded that petitioner was obligated to abate the ongoing nuisance by cleaning up the plume created by leaks from the refinery and pipelines owned by its corporate predecessor. *Id.* at 1a.[3]

---

[3] Before filing this suit, EPA attempted to work with the various oil companies that had operated in the area to formulate and coordinate a cleanup plan. Pet. App. 98a-108a. In 2004, four oil companies — not including petitioner — entered into an Administrative Order on Consent, under which they agreed to perform certain cleanup work at the site. *Id.* at 101a. Acting under the name Hartford Working Group, those

The United States' complaint also sought a declaratory judgment that its entitlement to injunctive relief was not discharged by the 1990 confirmation of the bankruptcy plan of petitioner's corporate predecessor. Pet. App. 197a. The district court granted summary judgment to the United States on that issue. *Id.* at 197a-211a. The court explained that, because "section 6973(a) does not allow the government to seek pecuniary relief here, * * * the injunction the government seeks could not have been discharged in earlier bankruptcy proceedings." *Id.* at 210a.

4. The court of appeals affirmed. Pet. App. 1a-12a. The court held that the government's entitlement to a RCRA injunction is not a "claim" within the meaning of the Bankruptcy Code, and that the confirmation of the bankruptcy plan of petitioner's corporate predecessor therefore did not preclude entry of such an injunction. The court observed (*id.* at 2a) that the Code defines the term "claim" to include a "right to an equitable remedy for breach of performance if such breach gives rise to a right to payment." 11 U.S.C. 101(5)(B).

---

companies agreed to implement several interim measures to address the most immediate vapor-intrusion problems, conduct a series of studies to evaluate the nature and extent of the contamination, and propose and design a system for recovering the contamination beneath the surface. *Ibid.*; see *id.* at 102a-108a. Petitioner declined to join the consent order. The district court made clear that the judgment against petitioner did not relieve other parties—including the members of the Hartford Working Group—of their responsibilities under the Consent Order or of potential shared liability for performance of any other remaining cleanup work in Hartford. *Id.* at 190a. The court of appeals noted that petitioner may be able to recover some of its costs of complying with the district court's order from other contributors to the contamination. *Id.* at 2a.

The court of appeals concluded that the RCRA provision that permits the United States to seek an injunction restraining a polluter from continuing to pose "an imminent and substantial endangerment to health or the environment," 42 U.S.C. 6973(a), "entitles the government only to require the defendant to clean up the contaminated site at defendant's expense," but "does not authorize *any* form of monetary relief." Pet. App. 4a. The court rejected petitioner's contention that, because compliance with any cleanup order would require the expenditure of money, such an injunction would entail a "right to payment" within the meaning of 11 U.S.C. 101(5)(B). The court explained that, because "[a]lmost every equitable decree imposes a cost on the defendant," Pet. App. 5a, the logical implication of petitioner's theory was that "every equitable claim is dischargeable in bankruptcy unless there is a specific exception in the Code," *id.* at 6a. The court of appeals concluded that, under Section 101(5)(B), a right to an equitable remedy is discharged only when "the claim gives rise to a right to payment because the equitable decree cannot be executed, rather than merely imposing a cost on the defendant, as virtually all equitable decrees do." *Id.* at 8a.

ARGUMENT

Petitioner does not dispute that it is legally obligated to clean up the massive underground oil spill that poses an ongoing substantial and imminent threat to health and the environment in Hartford, Illinois. Petitioner contends, however, that the government is foreclosed from obtaining an injunction to enforce that obligation because the government's entitlement to equitable relief is a "claim" that was discharged when the bankruptcy plan of petitioner's corporate predecessor was con-

firmed. The court of appeals correctly rejected that argument, recognizing that the government's entitlement to a RCRA injunction falls outside the Bankruptcy Code definition of "claim" because petitioner's breach of its environmental-law obligations does not give rise to any "right to payment." Although the Sixth Circuit adopted different reasoning 22 years ago in determining that an individual debtor's obligation to comply with an injunction was a dischargeable "claim," see *United States* v. *Whizco, Inc.*, 841 F.2d 147 (1988), no other court of appeals has followed that decision, and the Sixth Circuit has never applied it in the context of a corporate reorganization. Further review is not warranted.

1. a. Contrary to petitioner's contention (Pet. 11-28), the court of appeals' decision in this case is correct and is fully consistent with this Court's decision in *Ohio* v. *Kovacs*, 469 U.S. 274 (1985). When Congress enacted the current version of the Bankruptcy Code in 1978, it provided that a Chapter 11 confirmation order "discharges the debtor from any debt that arose before the date of such confirmation," subject to certain exceptions not relevant here. 11 U.S.C. 1141(d)(1)(A). The resulting discharge "operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor." 11 U.S.C. 524(a)(2). Congress defined the term "debt" as "liability on a claim," and it defined the term "claim" to include a "right to an equitable remedy for breach of performance if such breach gives rise to a right to payment." 11 U.S.C. 101(5)(B) and (12). By its terms, that definition excludes any right to an equitable remedy as

to which the relevant breach of performance does *not* give rise to a "right to payment."[1]

The disputed issue in this case is whether the clean-up injunction the United States obtained against petitioner is the type of equitable claim that has been reduced to a monetary obligation or otherwise gives rise to a right to payment. RCRA authorizes the United States to seek an equitable remedy for, *inter alia*, a responsible party's breach of its duty to remedy a hazardous waste site that poses an imminent and substantial endangerment to health or the environment. 42 U.S.C. 6973(a). RCRA does not authorize the United States to seek a monetary remedy in place of an equitable remedy. Because petitioner's breach of its environmental-law obligations does not give the United States (or, for that matter, any other potential recipient, see note 10, *infra*) a "right to payment," the government's statutory right to seek an injunction is not a "claim" within the meaning of Section 101(5)(B) and therefore is not dischargeable in bankruptcy.

b. Contrary to petitioner's contention (Pet. 10), this Court has not held that a duty to perform an environmental cleanup is a dischargeable "claim" simply because the performance of that duty will as a practical matter require the expenditure of funds. Although petitioner refers in passing to "an uninterrupted line of this Court's precedent" (Pet. 10), petitioner relies almost

---

[1] As noted in *Kovacs*, the House of Representatives considered a bill that was a predecessor of the 1978 Bankruptcy Reform Act and "would have deemed a right to an equitable remedy for breach of performance a claim even if it did not give rise to a right to payment." 469 U.S. at 280 & n.6 (citing H.R. 8200, 95th Cong., 1st Sess. 309-310 (1977)). But the compromise version that Congress ultimately enacted narrowed that aspect of the "claim" definition. *See id.* at 278, 280.

exclusively (other than a string cite to cases noting that courts should read the term "claim" broadly, see Pet. 26) on this Court's decision in *Kovacs*. Petitioner's reliance on that decision is misplaced.

In *Kovacs*, the State of Ohio sued William Kovacs, who owned and operated an industrial and hazardous waste disposal site, for violating state environmental laws. 469 U.S. at 276. Kovacs agreed to settle the suit by signing a stipulation and judgment that, *inter alia*, enjoined him from causing further pollution, required him to remove specified wastes from the property, and ordered him to pay $75,000 to the State for injury to wildlife. *Ibid.* When Kovacs failed to comply with any of those obligations, Ohio obtained the appointment in state court of a receiver, who was directed to take possession of all property and other assets belonging to Kovacs and to implement the judgment by cleaning up the site. *Ibid.* Kovacs filed a bankruptcy petition after the receiver had taken possession of the site, but before it had collected funds or other possessions from Kovacs to finance the cleanup. *Id.* at 276-277.

Both this Court and the lower courts in *Kovacs* found that, at the time Kovacs filed his bankruptcy petition, the State of Ohio had opted not to "prosecute Kovacs under the environmental laws or bring civil or criminal contempt proceedings," and instead had sought "only a monetary payment" from him. 469 U.S. at 277; see *id.* at 283 (noting the State's concession that "after the receiver was appointed, the only performance sought from Kovacs was the payment of money."). This Court held that, in those circumstances, Kovacs's obligation under the injunction was dischargeable in bankruptcy because "the cleanup duty had been reduced to a monetary obligation." *Id.* at 282; see *id.* at 280-283. The fact that the

State had "converted [its equitable claim] into an obligation to pay money," *id.* at 283, prior to the filing of the bankruptcy petition was critical to the Court's decision.[5]

The Court noted repeatedly that its holding was narrow, limited to "the circumstances" and the "facts" presented "as the case comes to us." 469 U.S. at 275, 283, 285. In the concluding paragraph of its opinion, the Court specifically observed that it was "not address[ing] what the legal consequences would have been had Kovacs taken bankruptcy before a receiver had been appointed." *Id.* at 284. The Court further explained that any person "in possession of the site * * * must comply with the environmental laws of the State of Ohio" and "may not maintain a nuisance, pollute the waters of the State, *or refuse to remove the source of such conditions.*" *Id.* at 285 (emphasis added). In the Court's view, however, the salient fact was that "Kovacs has been dispossessed and the State seeks to enforce his

---

[5] Contrary to petitioner's contention (Pet. 14-17, 26), the government's position in this case is consistent with the amicus brief for the United States filed in *Kovacs*. In *Kovacs*, the United States argued that the cleanup injunction at issue in that case fell "within the class of equitable rights excluded from the definition of 'claim,' and thereby preserved from discharge in bankruptcy." U.S. Br., No. 83-1020, at 18. In holding to the contrary, the Court did not disagree with the United States' observation that the Bankruptcy Code's definition of "claim" "exclud[es] any right to an equitable remedy for a breach of performance when the breach does not also give rise to an alternative right to payment." *Ibid.* Rather, the Court simply disagreed with the United States (and the State of Ohio) regarding the proper application of that principle to the facts of the case before it. As explained above, the Court found that Ohio's original right to a cleanup order had been converted to a monetary obligation prior to the commencement of the bankruptcy case, and that Kovacs's payment obligation was therefore a dischargeable debt.

cleanup obligation by a money judgment." *Ibid.* Here, by contrast, petitioner has access to the source of the contamination, the injunction that the United States sought and obtained against petitioner imposes a pure performance obligation, see Pet. App. 4a, 6a, and the government has done nothing to convert its right to an injunction into a claim for money.[6]

Contrary to petitioner's contention (Pet. 17-18), the theoretical possibility that the United States could seek the appointment of a receiver under Federal Rule of Civil Procedure 70(a) if petitioner refuses to comply

---

[6] Like the Seventh Circuit in this case, see Pet. App. 6a, other courts of appeals have concluded that the result in *Kovacs* turned on the steps the State had taken to convert its right to an injunction into a monetary claim prior to the filing of the bankruptcy. See, *e.g.*, *In re Ben Franklin Hotel Assocs.*, 186 F.3d 301, 304 (3d Cir. 1999) (noting that, "because Kovacs had been dispossessed from the property and the only thing that Ohio sought from him was the money to defray cleanup costs, the cleanup order had essentially been converted into a monetary obligation"); *In re Udell*, 18 F.3d 403, 406 (7th Cir. 1994) ("*Kovacs* * * * turned on the fact that Ohio had itself elected to convert its equitable right into a demand for a money judgment" when the State obtained the appointment of the receiver."); *United States* v. *LTV Corp. (In re Chateaugay Corp.)*, 944 F.2d 997, 1009 (2d Cir. 1991) (remarking that, "by virtue of Ohio's actions, 'the cleanup order had been converted into an obligation to pay money'"); *Whizco*, 841 F.2d at 150 ("Since the clean up order had been converted into an obligation to pay money, it gave rise to a 'right to payment.'"); *In re Commonwealth Oil Ref. Co.*, 805 F.2d 1175, 1187 n.14 (5th Cir. 1986) (finding that "it was the dispossession of Kovacs' assets and the appointment of a receiver that turned the injunction in that case into a dischargeable monetary obligation"), cert. denied, 483 U.S. 1005 (1987); *Conmonyer* v. *Town of Lincoln*, 790 F.2d 971, 975 (1st Cir. 1986) ("[B]ecause Kovacs had been dispossessed from his property by a state court appointed receiver and the only thing that the State wanted was the money to defray cleanup costs * * * the state cleanup order had been converted into a monetary obligation.").

with the district court's order does not bring this case within the rule announced in *Kovacs*. In that case, the State of Ohio had abandoned any effort to enforce a non-monetary remedy before the bankruptcy case was initiated, and the Court specifically reserved the question whether Kovacs's obligation would have been dischargeable if the sequence of events had been different. See pp. 9-11, *supra*; *Kovacs*, 469 U.S. at 283, 284. Here, by contrast, the United States has not abandoned its right to the equitable decree entered by the district court in this case.

b. The court of appeals faithfully applied the narrow holding of *Kovacs* and correctly interpreted the Bankruptcy Code to exclude the type of equitable right at issue here from the category of "claims" that are dischargeable in bankruptcy. Unlike the obligation that the State sought to enforce in *Kovacs*, see 469 U.S. 283, petitioner's obligation to remedy the contamination in Hartford—contamination petitioner no longer disputes poses an imminent and substantial endangerment to health or the environment—cannot be satisfied by a payment of money. As relevant here, RCRA authorizes the United States to bring suit against any person who has contributed to the handling, storage, or disposal of hazardous waste that "may present an imminent and substantial endangerment to health or the environment." 42 U.S.C. 6973(a). The court in such a suit may restrain the defendant from such handling, storage, or disposal, "order such person to take such other action as may be necessary, or both." *Ibid.*

In this case, the United States obtained an injunction ordering petitioner to, *inter alia*, take such "action as may be necessary to abate the hydrocarbon contamination at the Hartford Site and all associated conditions

that present or may present an imminent and substantial endangerment to health or the environment." App., *infra*, 3a. The cleanup order at issue here thus requires petitioner to remove the source of ongoing pollution and contamination. Because neither RCRA nor the relevant district court order allows petitioner to pay money to the government in lieu of carrying out the required cleanup, the obligation imposed on petitioner is not dischargeable in bankruptcy. See *Kovacs*, 469 U.S. at 285.[7]

c. In *Meghrig* v. *KFC Western, Inc.*, 516 U.S. 479 (1996), the Court held that RCRA's citizen-suit provision does not authorize a private citizen to "undertake a cleanup [of a hazardous waste site] and then proceed to

---

[7] As clarified in the briefing below, petitioner is wrong in suggesting (see Pet. 5-8, 22-23) that the United States behaved strategically by not asserting, in the bankruptcy case filed by petitioner's predecessor (Clark), monetary claims under other federal statutes such as the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), the Clean Water Act (CWA), or the Oil Pollution Act of 1990 (OPA). Unlike RCRA, CERCLA contains a "petroleum exclusion." See *Meghrig* v. *KFC Western, Inc.*, 516 U.S. 479, 485 (1996); 42 U.S.C. 9601(14). Section 311 of the CWA focuses on discharges to "navigable waters," which does not encompass groundwater. See 33 U.S.C. 1321(c) and (f); *Kelley* v. *United States*, 618 F. Supp. 1103, 1104-1107 (W.D. Mich. 1985). And the OPA was enacted after Clark's bankruptcy plan was confirmed on August 16, 1990, and long after the July 15, 1988, bar date for proofs of claim to be filed in Clark's bankruptcy. See Oil Pollution Act of 1990, Pub. L. No. 101-380, 104 Stat. 484 (enacted August 18, 1990). Petitioner is also incorrect in asserting that the property at issue here "had never been owned by either Clark or [petitioner]." Pet. 7; see Pet. 3, 5, 18. The injunction that the United States obtained under RCRA targets petroleum contamination emanating from the refinery property that Clark owned, and contamination in the soil and groundwater in the adjacent village that was transected by leaking pipelines that Clark owned as well. See Pet. App. 13a-21a, 184a-190a; App., *infra*, 1a-3a.

recover its costs under RCRA." *Id.* at 487. The Court noted that RCRA authorizes a private citizen to file suit to obtain an injunction ordering a "responsible party to 'take action' by attending to the cleanup and proper disposal of toxic waste." *Id.* at 484 (quoting 42 U.S.C. 6972(a)). The Court made clear, however, that a citizen cannot sue a responsible party solely for money damages to recover the cleanup costs the citizen has incurred prior to filing the action. *Id.* at 485-488. The Court declined to decide whether a private party could "obtain an injunction requiring another party to pay cleanup costs which arise after a RCRA citizen suit has been properly commenced." *Id.* at 488.

As the court of appeals in this case recognized (Pet. App. 4a), RCRA uses the same language to authorize a citizen suit that it does to authorize suit by the United States. Compare 42 U.S.C. 6972(a) with 42 U.S.C. 6973(a). Under Section 6973(a), the United States is authorized to seek an order requiring petitioner to clean up the contaminated site, which is exactly what the United States did in this case. Under RCRA, petitioner's breach of its environmental-law obligations does not entitle the United States to monetary payment from petitioner for use in hiring another entity to clean up the site. The equitable remedy that the statute afforded the government therefore did not "give[] rise to a right to payment" within the meaning of Section 101(5)(B) of the Bankruptcy Code. See *In re Torwico Elecs., Inc.*, 8 F.3d 146, 151 n.6 (3d Cir. 1993) (*Torwico*) (under New Jersey law, polluter "had no option to pay for the right to allow its wastes to continue to seep into the environment"), cert. denied, 511 U.S. 1046 (1994); *United States* v. *LTV Corp. (In re Chateaugay Corp.)*, 944 F.2d 997, 1008 (2d Cir. 1991) (*Chateaugay*) (because EPA has "no option to

accept payment in lieu of continued pollution" under the Comprehensive Environmental Response, Compensation, and Liability Act, "most environmental injunctions will fall on the non-'claim' side of the line.").

The government's position is that, if petitioner refuses to comply with the district court's injunction, and if the United States undertakes the required cleanup, then the government can recover from petitioner the money that the government expended. Contrary to petitioner's contention (Pet. 27-28), however, that position is in no way inconsistent with the court of appeals' decision in this case. Any monetary award that might be made in that hypothetical situation would be for petitioner's violation of the injunction, not for its earlier breach of its obligations under RCRA. See *United States* v. *United Mine Workers of Am.*, 330 U.S. 258, 303-304 (1947) ("Judicial sanctions in civil contempt proceedings may * * * compensate the complainant for losses sustained."); *SEC* v. *American Bd. of Trade, Inc.*, 830 F.2d 431, 441-442 (2d Cir. 1987) (affirming a civil contempt sanction that was designed "to restore [injured parties] to the position they would have been in if the injunction had been obeyed."), cert. denied, 485 U.S. 938 (1988). And even a breach of the injunction would not, standing alone, give the United States any right to a monetary award; the government would first be required to expend its own funds to carry out the cleanup. The possibility that the United States might eventually seek a monetary remedy if those contingencies unfold therefore provides no basis for characterizing petitioner's RCRA violation as a "breach of performance * * * [that] gives rise to a right to payment." 11 U.S.C. 101(5)(B).

2. Petitioner argues (Pet. 29-36) that this Court should grant certiorari to resolve a conflict among the courts of appeals. Petitioner cannot identify any disagreement, however, about the question actually presented in this case—whether the United States' right to an equitable cleanup remedy under RCRA is a "claim" dischargeable in bankruptcy. The Seventh Circuit in this case correctly held that such a right is not dischargeable, and no court of appeals has held otherwise.[8]

As petitioner explains (Pet. 31-32), the court of appeals in this case rejected the approach of the Sixth Circuit in *United States* v. *Whizco*, *supra*, a non-RCRA environmental cleanup case. See Pet. App. 7a. In *Whizco*, the United States obtained an injunction against a mining company and its sole shareholder—who had filed for a reorganization under Chapter 11 of the Bankruptcy Code, and then converted to a Chapter 7 liquidation after the United States filed its complaint—ordering them to perform specific acts of reclamation at mine sites the company had abandoned. 841 F.2d at 148. In order to comply with the injunction, the individual debtor would have needed "to hire others to perform the work for him" because he had surrendered all of his mining

---

[8] Since this Court's decision in *Kovacs*, several courts of appeals have enforced post-bankruptcy obligations arising from pre-bankruptcy conduct when the applicable non-bankruptcy law does not permit the payment of money in lieu of compliance. See, *e.g.*, *In re Ben Franklin Hotel Assocs. Inc.*, 186 F.3d at 304 (enforcing equitable demand for reinstatement of interest in partnership); *Gonzales* v. *Tucker*, 37 F.3d 295, 299-300 (7th Cir. 1994) (enforcing restrictive reciprocal land covenant); *In re Udell*, 18 F.3d at 406 (enforcing covenant not to compete); *Sheerin* v. *Davis (In re Davis)*, 3 F.3d 113, 116 (5th Cir. 1993) (enforcing demand for reinstatement of interest in corporation, partnership, and land).

equipment and coal leases in his bankruptcy, and because he was 63 years old and physically incapable of completing the work on his own. *Id.* at 149-150. The Sixth Circuit held that, to the extent compliance with the reclamation order would require the individual debtor "to spend money, the obligation was a liability on a claim as defined by the Bankruptcy Code." *Id.* at 150-151.[7]

As the court of appeals in the instant case explained (Pet. App. 5a-7a), the Sixth Circuit's analysis in *Whizco* is inconsistent with the text of the Bankruptcy Code and with the weight of relevant case law. In the 22 years since *Whizco* was decided, no other court of appeals has adopted its reasoning. Rather, the Seventh Circuit in this case correctly rejected the expenditure-of-money test adopted in *Whizco*, and joined the Second and Third Circuits in holding that a discharge in bankruptcy does not bar subsequent entry of an injunction ordering a debtor (or its corporate successor) to remedy ongoing pollution. See Pet. App. 5a-9a; *Torwico*, 8 F.3d at 150-151; *Chateaugay*, 944 F.2d at 1008-1009.

Unlike *Whizco*'s expenditure-of-money test, the Seventh Circuit's approach accords with the statutory definition of "claim" and with congressional intent. Because a bankruptcy discharge extinguishes a debtor's "liability on his creditor's claims," *Johnson* v. *Home State Bank*, 501 U.S. 78, 84 n.5 (1991), the definition of "claim"

---

[7] The court in *Whizco* also stated that, "[t]o the extent that the [debtor] can comply with the * * * orders without spending money, his bankruptcy did not discharge his obligation to comply with the orders. * * * The [debtor] may in the future own equipment which would permit him to personally reclaim some portion of the site." 841 F.2d at 151. But in drawing that distinction, the Sixth Circuit did not explain how the debtor could acquire or use his own equipment "without spending money" (*e.g.*, to purchase the equipment or to pay for fuel).

(11 U.S.C. 101(5)) naturally focuses on the nature of the potential claimant's right against the debtor. Given that focus, the Seventh Circuit was correct that "the cost to [petitioner] is not 'a right [of the United States] to payment' " under Section 101(5). Pet. App. 5a [10]

Use of the expenditure-of-money test would have particularly untoward consequences as applied to corporate debtors (and their corporate successors). Unlike the individual debtor in *Whizco*, a corporation acts only through its paid employees and agents, and any action it might take to comply with an injunction therefore "costs money." That is true, as the Seventh Circuit noted (Pet. App. 8a), whether the corporation can perform the obligation with its own employees or must hire a third-party contractor, as petitioner asserts (Pet. 8) would be necessary in the present case. Particularly in the corporate context, the Sixth Circuit's improper focus on compliance expenditures would prevent Section 101(5)(B)'s "right to payment" language from imposing

---

[10] Petitioner contends (Pet. 20) that, even though the government holds the "right to an equitable remedy" (in the form of a cleanup order) for petitioner's breach of its environmental law obligations, that right is a dischargeable "claim" if it confers a "right to payment" on some *other* entity (*e.g.*, a private contractor hired to carry out the clean up). As the court of appeals appeared to recognize (Pet. App. 5a), Section 101(5)(B) is more naturally read to contemplate that the "right to an equitable remedy" and the "right to payment" will be held by the same person. But even if petitioner's effort to decouple the two had merit, petitioner identifies no non-federal entity that could plausibly be said to possess a "right to payment" resulting from petitioner's breach of its environmental law obligations. Petitioner's assertion (Pet. 8) that it must as a practical matter hire *some* private contractor in order to comply with the district court's injunction does not imply that the particular contractor it ultimately selects has a "right to payment" within the meaning of Section 101(5)(B).

any meaningful practical limit on the class of equitable remedy rights that will constitute dischargeable claims. That reading would violate the "cardinal principle of statutory construction * * * that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." *TRW, Inc.* v. *Andrews*, 534 U.S. 19, 31 (2001) (quoting *Duncan* v. *Walker*, 533 U.S. 167, 174 (2001)). The Sixth Circuit did not grapple with those issues in *Whizco*, which involved an individual rather than a corporate debtor.

In *Torwico*, the Third Circuit explained that permitting debtors to discharge equitable performance obligations would interfere with the government's right to "exercise its regulatory powers and force compliance with its laws." 8 F.3d at 150. As that court explained, "[w]ere we to adopt the * * * position that any order requiring the debtor to expend money creates a dischargeable claim, it is unlikely that the state could effectively enforce its laws: virtually all enforcement actions impose some costs on the violator." *Id.* at 150 n.4. In an analogous context involving the "police and regulatory power" exception in 11 U.S.C. 362(b)(4) to the Bankruptcy Code's automatic stay provision, the First, Third, Fourth, and Fifth Circuits have all held that governmental actions to enforce compliance with environmental requirements do not amount to "enforcement of a * * * money judgment" within the meaning of the statute, even when compliance would require the expenditure of money. *Safety Kleen, Inc. (Pinewood)* v. *Wyche*, 274 F.3d 846, 861-866 (4th Cir. 2001); *In re Commonwealth Oil Ref. Co.*, 805 F.2d 1175, 1183-1188 (5th Cir. 1986), cert. denied, 483 U.S. 1005 (1987); *Cournoyer* v. *Town of Lincoln*, 790 F.2d 971, 974-976 (1st Cir. 1986); *Penn Terra Ltd.* v. *Department of Envtl. Res.*, 733 F.2d

267, 274-278 (3d Cir. 1984) ("[I]n contemporary times, almost everything costs something. An injunction which does not compel some expenditure or loss of monies may often be an effective nullity.").

The Sixth Circuit's decision in *Wetzel* is an outlier and has never been applied by that court outside the individual-debtor context or by any other court of appeals.[11] There is consequently no need for this Court to grant the petition for a writ of certiorari to resolve the difference in reasoning between that decision and the ruling below. See Pet. App. 8a ("The sparsity of case law dealing with the discharge of claims such as [petitioner's], together with the near consensus of the cases, cited above, in which the issue has arisen, suggests a general understanding that discharge must indeed be limited to cases in which the claim gives rise to a right to payment because the equitable decree cannot be executed, rather than merely imposing a cost on the defendant, as virtually all equitable decrees do."). Indeed, the Court previously declined to consider most of the arguments that petitioner raises when it denied a petition for a writ of certiorari in *Torwico*.[12] Since more than 15

---

[11] Only one reported case from a bankruptcy court has ever applied *Wetzel* in a corporate reorganization context. *See Tate Dist. of Or. Gas and Mining v. Kaiser Steel Corp. (In re Kaiser Steel Corp.)*, 87 B.R. 662, 665 (Bankr. D. Colo. 1988).

[12] The question presented by the petition in *Torwico* was: "Whether an order by a government environmental agency, requiring a corporate chapter 11 debtor to spend assets of its estate to clean up property not owned or occupied by the debtor, constitutes a dischargeable 'claim' within the meaning of section 101(5) of the Bankruptcy Code, as interpreted by the Court in *Ohio v. Kovacs*, 469 U.S. 274 (1985)." Pet. at i, *Torwico Elecs., Inc. v. New Jersey*, No. 93-1187. The petition argued

years have elapsed since that time and no other court of appeals has aligned itself with the Sixth Circuit, there is no reason for a different result in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NEAL KUMAR KATYAL
Acting Solicitor General
IGNACIA S. MORENO
Assistant Attorney General
KANDALL M. STONE
Attorney

JULY 2010

---

that a circuit split existed between the Third Circuit's decision in *Trevino* and the Sixth Circuit's decision in *Wetzel*. *Id.* at 9, 18-19.

APPENDIX

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

No. 05-CV-242-DRH

UNITED STATES OF AMERICA, PLAINTIFF

v.

APEX OIL COMPANY, INC. DEFENDANT

July 28, 2008

ORDER AND TERMS OF INJUNCTION PURSUANT TO FED. R. CIV. P. 65(d)

HERNDON, Chief Judge:

Defendant Apex Oil Company, Inc. is hereby enjoined as follows:

1. Defendant shall continue the implementation of the In-Home Interim Measures program at the Hartford Site—in accordance with the U.S. EPA-approved Revised Effectiveness Monitoring Plan (Pl. Ex. 250)—including maintaining all In-Home Interim Measures for vapor intrusion mitigation, performing periodic monitoring, and responding to situations arising under the U.S. EPA-approved Contingency Plan.

2. Defendant shall continue the operation and maintenance of the areawide Vapor Control System that op-

erates as an Interim Measure for vapor intrusion mitigation at the Hartford Site, and shall ensure that all elements of the System continue to operate at adequate capacities and efficiencies.

3. Defendant shall continue periodic groundwater monitoring at the Hartford Site in a manner that is consistent with the existing Quarterly Groundwater Monitoring Program and the Sentinel Well Monitoring Program.

4. Defendant shall construct, operate, and maintain all components of the Active LNAPL Recovery System remedy—in accordance with the Active LNAPL Recovery System 90% Design (Pl. Ex. 206) and U.S. EPA's prior written comments and qualifications in accepting the 90% Design—to abate the light non-aqueous phase liquid hydrocarbon contamination beneath the Village of Hartford.

5. Defendant shall complete the investigation of groundwater contamination at the Hartford Site and design and implement a groundwater treatment remedy to abate the dissolved phase hydrocarbon contamination at the Hartford Site and all associated conditions that present or may present an imminent and substantial endangerment to health or the environment.

6. Defendant shall investigate the conditions relevant to the potential migration of groundwater contamination from beneath the Hartford Refinery to beneath the Village of Hartford and shall design and implement a program to abate any conditions that contribute, or may in the future contribute, to petroleum hydrocarbon contamination beneath the Village.

7. Defendant shall take such other action as may be necessary to abate the hydrocarbon contamination at the Hartford Site and all associated conditions that present or may present an imminent and substantial endangerment to health or the environment, pursuant to the terms of any further order of the Court.

8. Defendant shall coordinate and cooperate with the parties to the existing Administrative Order on Consent in performing activities required under this injunction.

9. All work required by this injunctive order shall be subject to U.S. EPA oversight and approval.

IT IS SO ORDERED.

Signed this 28th day of July, 2008.

/s/ DAVID R. HERNDON
DAVID R. HERNDON
Chief Judge
United States District Court
Southern District of Illinois